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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,	
Plaintiff and Respondent,	G044753
v.	(Super. Ct. No. 08CF1695)
ALBERTO SOLIS GUZMAN,	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, W. Michael Hayes, Judge. Affirmed.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry J.T. Carlton and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

In November 2010, a jury convicted defendant Alberto Solis Guzman of assault resulting in the death of a child under eight years old (child abuse homicide) (Pen. Code, § 273ab; count 2)[1]; child abuse with force likely to produce great bodily injury or death (§ 273a, subd. (a); count 3); and corporal injury on a child (§ 273d, subd. (a); count 4).[2] The court sentenced defendant to 25 years to life in prison for child abuse homicide. It imposed but stayed execution of sentence on the other two counts pursuant to section 654.

On appeal defendant contends his child abuse homicide conviction is unsupported by substantial evidence. We disagree and affirm the judgment.

FACTS

The victim, Brandon M., was four or five years old when he died on May 30, 2008.[3] About seven months earlier, his mother, Gabriela M., had brought her three children (including Brandon, her youngest child) to the United States from Mexico.[4] Prior to that, she had not seen the children for years.

Brandon could not speak well for his age. He also had "potty training" issues. Gabriela grew frustrated with him.

Defendant was Gabriela's boyfriend. He lived with her and her children in an apartment together as a family. The children called defendant "Dad."

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1 All statutory references are to the Penal Code.

2 The information also charged defendant with murder (§ 187, subd. (a); count 1), but the jury acquitted him of that offense.

3 All references to dates refer to the year 2008, unless otherwise stated.

4 To avoid confusion and for the confidentiality of the children, we refer to Gabriela M. by her first name.

While Brandon's siblings slept in bunk beds, Brandon was told to sleep on the floor. Brandon's older brother, G.M. (who was nine years old when Brandon died), was forbidden to share his bed with Brandon, so G.M. sometimes slept on the floor with the younger boy. Gabriela and defendant would sometimes leave Brandon home alone. G.M. would try to stay home with Brandon, but was not allowed to do so.

Defendant punished Brandon by making him stand with his hands held behind his head for long periods of time or by not letting him eat. Gabriela sometimes did not allow Brandon to eat. When G.M. gave Brandon food, he would get in trouble with defendant. Defendant hit Brandon on his back, legs, and buttocks with a belt every day. About twice a week, G.M. heard Brandon cry loudly when defendant took him into the bathroom and closed the door.

Around a week before Brandon's death, Gabriela's sister-in-law and her husband encountered defendant and Brandon walking near the apartment. Brandon was wearing a sweatshirt with a hood over his head. Defendant said they were going to the store to get medicine for Brandon's headache. When the sister-in-law asked what had happened, Brandon started to speak, but defendant stepped in front of the boy and said Brandon had fallen from a bed. Brandon's eyes teared up as though he were about to cry. Defendant declined an offer for a ride to the store and said he and the boy would walk.

On the afternoon of May 30, Gabriela came to the apartment of a neighbor, Rosalba Curiel Elizondo. Gabriela seemed nervous and scared, and asked Elizondo to come and see Brandon who was "privado." The record indicates the word "privado" is used in Mexico to refer to a child who "cries a lot and . . . their tongue gets stuck to the palate which prevents the child from breathing." Gabriela said Brandon had been in that condition for about 10 minutes *or* 30 minutes. Gabriela said she had not called the paramedics because she did not have a phone.

Elizondo arrived to find the child "laying on his bed," "his little body . . . cold." "He was like asleep." His pulse was "quite weak." Elizondo gave him

mouth-to-mouth resuscitation. Then Elizondo "came out running," found some neighbors, and phoned 9-1-1 from their cell phone.

Firefighters and paramedics responded to the call at about 4:00 p.m. They "found a woman in a back bedroom sitting in a chair, holding a small child." The child "had obvious signs of cardiac arrest: unconscious, pulseless, apneic, which is not breathing . . . and cold to the touch." The woman who had been holding the child said that he had fallen.

The paramedic took the child to the hallway and took off his clothes. There was "a lot of bruising" on the child's chest, legs, and arms.

A woman (*not* the one who had been holding the child) came from behind, yelling hysterically in Spanish. She identified herself as the child's mother. The paramedic asked her how long the child had been like this. First she said about 10 minutes. The paramedic told her to stop lying. She changed her estimate to one hour. The paramedic began resuscitation efforts.

The paramedics transported Brandon to a hospital emergency room. Brandon was in full cardiac and respiratory arrest, i.e., he was not breathing and had no pulse or heartbeat. Resuscitation efforts were unsuccessful. Brandon's body was cold and stiff, indicating he had been deceased for some period of time. He was officially pronounced dead. The attending physician concluded Brandon had multiple injuries that were inconsistent with a fall.

Investigation

A detective and two deputy coroner investigators examined Brandon's body at the hospital. Brandon had numerous injuries on his chest, legs, arms, hips, head, ears, and face. His lower lip was bleeding and appeared to be split.

Security cameras at the apartment complex showed defendant left the apartment at around 1:00 p.m. on May 30. Defendant clocked in at his place of

employment at 2:00 p.m. Gabriela left the apartment at 2:20 p.m. with Brandon in her arms, and returned at 2:35 p.m. with Brandon and the two other children. Paramedics arrived at 3:55 p.m. Defendant returned to the apartment that night at around 10:30 p.m.

Later that night, in the early hours of May 31, Gabriela took officers into the apartment's only bedroom, which had a queen size bed and a bunk bed. Initially, Gabriela said Brandon fell off the top bunk onto the carpeted floor while reaching for some small figurines on a windowsill above the bunk bed. Gabriela said that when she saw Brandon, he had one of the little toys in his hand. An officer told Gabriela that the figurines looked dusty, as though they had not been touched or moved. Gabriela then admitted she had lied.

In the bathroom trash can, the officers found a set of boy's pajamas which was completely wet and soiled with fecal matter. In the bathtub was a small log of feces, a wash cloth, and some blood "smears" or blood "drops," as well as a blood stain on the edge of the tub.[5]

In a large trash bag in the kitchen, the officers found a blood-stained towel and a blood-stained woman's blouse. DNA testing revealed Brandon's blood on the towel and blouse.

An autopsy performed on Brandon's body on May 31 revealed bruises on his head, ear, face, chest, pelvis, buttocks, arms, and legs. Brandon's eyes showed hemorrhaging. Some of Brandon's injuries had occurred within two hours of his death. The large size of some of the bruises were indicative of a greater force being applied. The number and varied locations of Brandon's injuries were inconsistent with a single fall. The forensic pathologist opined that Brandon died from multiple nonaccidental injuries to his head and face which caused hemorrhaging into his brain and swelling of

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[5] One officer observed "blood smears," while the other noticed "drops" of blood.

his brain. Brandon had suffered six injuries to his brain, which might have been caused by more than six external injuries which merged.

Defendant's First Interview

Officers interviewed defendant on May 30 and again on May 31. In the May 30 interview, defendant initially denied hitting Brandon, but later admitted he did. In that first interview, defendant said Gabriela hit the child more often than he did. Defendant hit Brandon with his hand or a felt belt and aimed for his feet, but sometimes accidentally hit his legs or buttocks if the child moved. Defendant denied hitting Brandon in the chest or head, but later admitted that a month before Brandon's death, he had hit the child in the head with an open hand. Defendant then changed his story to say he hit Brandon's head with the bottom of his fist.

Defendant and Gabriela usually disciplined Brandon by putting him in cold water in the bathtub and hitting him. Defendant and Gabriela began scolding Brandon because he had "potty training" issues.

Defendant hit Brandon in the mouth with an open hand on May 30 because the child had eaten out of the trash can. Gabriela hit Brandon three times in the back of the head that day.

Defendant's Second Interview

Defendant's May 31 interview was recorded and transcribed. Defendant was advised of and waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436.

Defendant denied hitting Brandon on the head with a closed fist, but later admitted that he had done so once, "a long time ago." Defendant said the following. When he bathed Brandon in cold water in the bathtub, he would hit the tub with his hand to scare Brandon into getting in the tub. Gabriela hit Brandon on the mouth in

defendant's presence on May 30 because the boy was not doing his writing exercises. Defendant told her to stop hitting the child.

After the officers mentioned the possibility of a lie detector test, defendant gave further explanations. On May 30, before he went to work, he had Brandon bathe in lukewarm water because the boy had not bathed for a week and smelled a little sweaty. Defendant hit Brandon "a little hard" on the mouth when the child was in the bathtub, because the child had eaten food from the trash. The hit made Brandon's lip swell, but not to bleed. Brandon ate out of the trash can because Gabriela "hardly [gave] him food to eat." After the bath, Brandon put on his clean pajamas. When defendant left for work, Brandon had not soiled the pajamas, and was fine and sitting on the edge of a chair doing writing exercises.

When Brandon was seated at the table, Gabriela would often walk by and hit him hard on the back of the head, knocking the child to the table. Gabriela would hit Brandon for no reason, "just to hit him." When defendant told Gabriela not to hit Brandon anymore and asked why she hit the child so much, Gabriela said she did not love him, and could not stand him, "just by seeing him." Defendant would only hit Brandon because he wet or soiled his pants, was mischievous, or ate food out of the trash. Gabriela would leave Brandon home alone for hours because she felt his "chair" (possibly a car seat) would not fit in the car. Defendant would tell her to take him, "what's it going to cost you?", but Gabriela left the boy locked in the house after tying the door shut. When Gabriela allowed him to go out, Brandon would take defendant's hand because "the boy was very much afraid of" Gabriela. Brandon would wet his pants because he was afraid to tell Gabriela he had to go to the bathroom.

On occasion, when defendant would punish Brandon by forcing him to bathe in cold water, he would hit Brandon on the head and the boy's head would strike the wall of the tub. This had last happened a month ago, when Brandon had wet the bed.

On May 30, defendant stated he hit Brandon on the head, mouth, and shoulder with an open hand to get him to hurry, but Brandon did not hit himself on the tub and was healthy when defendant left for work.

Defense

Employment records showed that on May 30, defendant clocked into work at 2:00 p.m. and clocked out at 10:30 p.m.

Gabriela had told Elizondo that she (Gabriela) had problems with Brandon and that Brandon would cry and throw himself on the floor when he did not get what he wanted. Gabriela had told her sister-in law that Brandon ate like a two-year-old instead of a four-year-old and wet his bed.

G.M., in an interview with a social worker, said that sometimes his mother and defendant would make Brandon sleep on the floor. Gabriela and defendant hit Brandon. G.M. saw his mother pull his sister's hair and hit her with a belt. Gabriela sometimes would deny Brandon food. Gabriela hit G.M. with a shoe on one occasion. On May 30, Gabriela told G.M. to lie and say Brandon had fallen off the bunk bed. G.M. saw defendant throw Brandon in the bathtub filled with cold water to punish him. G.M. saw bruises on Brandon almost every day. The bruises on Brandon's head and back were caused by defendant while the bruises on the front of Brandon's body were caused by Gabriela.

In Gabriela's police interview, she eventually admitted she hit Brandon "hard" on the head on May 30 while he was sitting on an iron chair at the dining table. She hit him because he was doing writing exercises as punishment, but had started doing them backwards as was his habit.

When she hit Brandon, he "hit himself on the chair" and fell to the side. She picked him up and sat him down and he was fine. She went to the sofa and heard something fall. She went back to Brandon and saw his eyes were half open.

She took him to the bathroom and put water and alcohol on him. She removed his pajamas after she put him in the tub because he had soiled them when he fell on the carpet, and she put the dirty pajamas in the trash can. He was still breathing but trying to close his eyes. She put him on the bed and tried to give him air, but it was time to pick up her other children. She put his other clothes on.

When asked about the blood, Gabriela said Brandon only had blood on his mouth and that blood always dripped from his nose. When asked about the bruise on Brandon's chest, Gabriela said Brandon did not have the bruise at the time she put water on his head.

Gabriela claimed she hit Brandon between 1:30 and 2:00 p.m. She said Brandon was still "fine" (although becoming weak) when she carried him outside to meet the other children. Gabriela said defendant had left the apartment around 1:00 p.m. and was not home when she hit Brandon. She said she had previously lied by saying defendant left the house at 10:00 a.m. because she did not want defendant "to have problems because of [her] fault." She said that what had happened to Brandon that day was her fault.

Gabriela said she and defendant had been hitting Brandon for about two months because Brandon defecated in his pants. Defendant would hit Brandon with his hand or a belt when defendant had to bathe the boy. Gabriela said she had lied about Brandon climbing to get the figurines because she did not want to have her other children taken away from her.

After the interview ended, the officers left the interview room, although Gabriela begged them not to leave. Left alone in the room, Gabriela wailed, inter alia: "Forgive me, Brandon, for doing this to you." "Why did I hit him? Why? Why? Forgive me." "Brandon, I swear to you I didn't want to do this to you." "What's going to happen? Oh, oh, oh, Brandon. Oh, I hate you. I hate you. Why? Why? Please. Oh, Brandon, forgive me, son."

DISCUSSION

Substantial Evidence Supports Defendant's Child Abuse Homicide Conviction

The sole issue on appeal is whether defendant's child abuse homicide conviction is supported by substantial evidence under any theory, whether as a direct perpetrator, aider and abettor, or co-conspirator. Defendant argues the jury convicted him of child abuse homicide as an aider and abettor or as a co-conspirator, *not* as a direct perpetrator. Consequently, his appellate briefs focus primarily on aiding and abetting and conspiracy.

"Section 273ab defines the offense of child abuse homicide." (*People v. Wyatt* (2010) 48 Cal.4th 776, 780 (*Wyatt*).) Under section 273ab, subdivision (a), a person who has the care of a child under eight years old and "who assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life." "The manifest purpose of section 273ab is 'to protect children at a young age who are particularly vulnerable.'" (*Wyatt*, at p. 780.) A "defendant may be guilty of an assault within the meaning of section 273ab if he acts with awareness of facts that would lead a reasonable person to realize that great bodily injury would directly, naturally, and probably result from his act. [Citation.] The defendant, however, need not know or be subjectively aware that his act is capable of causing great bodily injury. [Citation.] This means the requisite mens rea may be found even when the defendant honestly believes his act is not likely to result in such injury." (*Id*. at p. 781.)

"To determine whether the evidence at trial was sufficient to support defendant's conviction for child abuse homicide, 'we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a

reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] 'We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.'" (*Wyatt, supra*, 48 Cal.4th at p. 781.) "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Defendant asserts the jury did *not* convict him of child abuse homicide as a direct perpetrator, and, even if it did, insufficient evidence supports his homicide conviction on that basis. His assertion the jury did not convict him as a direct perpetrator is based on the following question asked by the jury at 3:47 p.m. during its deliberations on November 22, 2010: "Is there more legal definition of what constitutes [second] degree murder?" To this question the court replied, "No — the instructions you have are the legal definition to apply in this case." The jury then asked, "In regards to Reasonable Person — who is the reasonable person, the defendant or the general population?" The court replied, "What would an ordinary person do or not do under the same and similar circumstances? (It is not the defendant['s] view, but an ordinary person['s] view in the same or similar circumstances.[)]"

Defendant contends these questions reveal the jury convicted him of child abuse homicide as an aider and abettor. Defendant reasons that the reasonable person standard was not relevant to the murder charge unless the jury was debating his liability

for murder under the natural and probable consequences doctrine. The court instructed the jury that if defendant was guilty of felony child abuse, he could be found guilty of murder or child abuse homicide committed at the same time by a coparticipant in the felony child abuse if, "Under all the circumstances, a reasonable person in defendant's position would have known that the commission of murder [or child abuse homicide], was a natural and probable consequence of the commission of the Child Abuse with Force Likely to Produce Great Bodily Injury or Death . . . ."

The Attorney General points out, however, that over four hours *earlier*, at 11:17 a.m. that day, the jury asked the court, "Can we have a unanimous conclusion on Count 2 [child abuse homicide] without having a unanimous conclusion on Count 1 [murder]?" At 2:19 p.m. that day, the jury asked the court, "Would a unanimous decisions [*sic*] on Counts 2, 3, 4 and a non-unanimous decision on Count 1 constitute a hung jury?" Thus, the Attorney General posits that these questions (which preceded the jury's queries on murder) suggest the jury convicted defendant on counts 2, 3, and 4 as a direct perpetrator, *before* becoming stalled on the murder charge and trying for the first time to apply the "reasonable person" standard associated with aiding and abetting.

We cannot infer from the jury's questions which of the competing theories of conviction were adopted by the jury. To adopt either party's conclusion requires us to speculate. Contrary to the Attorney General's argument, the jury could have convicted defendant of child abuse homicide as an aider and abettor based on a conclusion that a reasonable person would have known that a natural and probable consequence of felony child abuse was child abuse homicide. But when faced with the requirement of determining whether a reasonable person would have known that a natural and probable consequence of felony child abuse was murder — i.e., that a reasonable person would have known that the direct perpetrator would act with implied malice — the question became more difficult for the jury to answer. By the same token, contrary to defendant's

argument, the evidence was also sufficient, as discussed below, to convict defendant of child abuse homicide as a direct perpetrator.

Ultimately, the "question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached. Just as the standard announced today does not permit a court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder — if known." (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319, fn. 13.)

Nor must the jurors agree on a single theory of liability. "[U]nanimity as to exactly how the crime was committed is not required." (*People v. Russo* (2001) 25 Cal.4th 1124, 1135 [unanimity instruction not appropriate "'where multiple theories . . . may form the basis of a guilty verdict on one discrete criminal event'"].) For example, "as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder as that offense is defined by statute, it need not decide unanimously by which theory he is guilty. [Citations.] More specifically, the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator." (*People v. Santamaria* (1994) 8 Cal.4th 903, 918.)[6]

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[6] The court instructed the jury that a person may be guilty of a crime if he or she directly commits the offense; aided and abetted the perpetrator; or was a member of a conspiracy to commit the offense.

In the prosecutor's closing argument, he discussed the potentially applicable theories of defendant's liability for the charged crimes, including that defendant "directly commit[ted] the crime." The prosecutor argued defendant should be held responsible for the murder, physical assaults, and child abuse of Brandon because defendant "perpetrated most of it or part of it or some of it," and was "in on" the "rest of it" as an aider and abettor and co-conspirator. The prosecutor explained to the jurors that "the law does not require a jury to be unanimous on a theory of liability." Defendant contends the prosecutor argued only that defendant directly perpetrated *corporal punishment*, not that he directly perpetrated *child abuse homicide*. Not so. Although the prosecutor "started with" the corporal punishment charge and discussed the elements of that offense and the evidence that defendant directly committed or satisfied those elements, it is apparent from the prosecutor's entire argument on the various theories of

1. Substantial evidence supports defendant's conviction as a direct perpetrator

Defendant argues the evidence shows he could *not* have directly perpetrated child abuse homicide and therefore the jury must have convicted him as an aider and abettor, for which, according to defendant's argument, the evidence was insufficient. His argument centers on the time of Brandon's death. Although defendant concedes that the exact time of Brandon's death "was not conclusively determined," he argues the evidence shows Brandon "stopped breathing and died close to 3:30 p.m." He relies on the following evidence: The security camera showed defendant left the apartment at 1:00 p.m. When defendant left the apartment, Brandon was sitting at a table doing writing exercises. Gabriela told the police she hit Brandon between 1:30 p.m. and 2:00 p.m. and only later did the child become unconscious. At 2:20 p.m., Gabriela was seen carrying Brandon when she left the apartment. By the time the emergency responders arrived at the apartment at 3:55 p.m., Brandon was not breathing, he was cyanotic, and his body was cold. Prior to that, Gabriela had told Elizondo that Brandon had been unconscious for a half hour.

Defendant next relies on the forensic examiner's testimony that most of Brandon's injuries occurred within two hours of his death. Defendant concludes "the fatal blows were inflicted within two hours of death," i.e., sometime after 1:30 p.m., a time when he was not present in the apartment.

But defendant's conclusion that Brandon died around 3:30 p.m. is based largely on (1) his own statements to the police that Brandon was fine when he left for work, and (2) Gabriela's statement to the police that she hit Brandon between 1:30 p.m. and 2:00 p.m. and that he fell unconscious sometime after that. The jury may have disbelieved some or all of this testimony.

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liability that he applied the principles of each theory to various charges as examples of how the respective theory could be applied.

Furthermore, defendant ignores the possibility that the injuries he inflicted on Brandon may have combined with those wrought by Gabriela to cause the boy's death. As defendant stated to the police, he would punish Brandon by forcing him to bathe in cold water; he would hit Brandon on the head and the boy's head would strike the wall of the tub. And defendant stated that on May 30, he hit Brandon on the head, mouth, and shoulder with an open hand to get him to hurry, but denied that Brandon hit himself on the tub and insisted Brandon was healthy when defendant left for work. The jury was entitled to disbelieve the exculpatory part of defendant's explanation. Any form of homicide "requires a showing that the defendant's conduct proximately caused the victim's death. [Citations.] When there are concurrent causes of death, the defendant is criminally responsible if his or her conduct was a substantial factor contributing to the result." (*People v. Butler* (2010) 187 Cal.App.4th 998, 1009 [discussing involuntary manslaughter].) """"A cause is concurrent if it was operative at the time of the death and acted with another cause to produce the death."'" [Citation.] [¶] When there are multiple concurrent causes of death, the jury need not decide whether the defendant's conduct was the primary cause of death, but need only decide whether the defendant's conduct was a substantial factor in causing the death." (*Ibid*.) "Whether the defendant's conduct was a proximate, rather than remote, cause of death is ordinarily a factual question for the jury unless '"undisputed evidence . . . reveal[s] a cause so remote that . . . no rational trier of fact could find the needed nexus."' [Citation.] A jury's finding of proximate causation will be not disturbed on appeal if there is 'evidence from which it may be reasonably inferred that [the defendant's] act was a substantial factor in producing' the death." (*Id.* at p. 1010.)

Here, the court instructed the jury that for defendant to be convicted of child abuse homicide, defendant's act must have been "the direct and substantial factor in causing the death," but such act need not "be the only factor that causes death. . . ." As to causation, the court instructed the jury with a reiteration of this concept: "There may be

more than one cause of injury. An act causes injury only if it is a substantial factor in causing the injury. A substantial factor is more than a trivial or remote factor. However, it does not have to be the only factor that causes the injury." Thus, substantial evidence supports defendant's conviction of child abuse homicide as a direct perpetrator.

2. Substantial evidence supports defendant's conviction as an aider and abettor

The evidence also amply supports defendant's criminal liability as an aider and abettor. A defendant is criminally liable under the natural and probable consequences doctrine if: (1) he acted with "knowledge of the unlawful purpose of the perpetrator; and (2) [with] the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice [defendant] aided, promoted, encouraged or instigated the commission of the target crime . . . ; (4) the defendant's confederate committed an offense *other than* the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*People v. Prettyman* (1996) 14 Cal.4th 248, 262.)

Here, the target offense was felony child abuse. (§ 273a, subd. (a).) Accordingly, the threshold inquiry is whether the evidence supports a finding that defendant aided and abetted Gabriela in committing felony child abuse. "An aider and abettor is one who acts with both knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense." (*People v. Avila* (2006) 38 Cal.4th 491, 564.) Felony child abuse is committed where a person, "under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be

placed in a situation where his or her person or health is endangered . . . ." (§ 273a, subd. (a).) Substantial evidence supports the jury's implied finding that Gabriela inflicted "unjustifiable physical pain or mental suffering" upon Brandon. Inter alia, she acknowledged in her police interview that on the day Brandon died she hit him hard, that he fell to the ground, he got up, but he again fell down. Defendant and Gabriela had been hitting Brandon for two months because he would defecate in his pants.

Felony child abuse, section 273a, subdivision (a), is a continuous course of conduct crime. (*People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462-1463.) So the question presented with regard to defendant's aiding and abetting liability is not limited to whether defendant aided and abetted a single fatal blow. In *People v. Culuko* (2000) 78 Cal.App.4th 307, under facts bearing many similarities to the facts of the instant case, the defendant argued "the jurors should have been required to: (1) identify each particular *act* of felony child abuse; (2) determine whether the defendant who did not perpetrate *that* act of felony child abuse did aid and abet it; and, if so, (3) determine whether murder was the natural and probable consequence of *that act* of felony child abuse." (*Id*. at p. 326, italics added.) The *Culuko* court *rejected* defendant's argument, stating: "This is clearly not the law. '"A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the *crime*, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the *crime*."'" (*Id*. at p. 326.) "[I]n applying the natural and probable consequences doctrine, the jury must consider the aider and abettor's actual circumstances. The aider and abettor may intend or expect the perpetrator to commit the crime in the form of a single, well-defined criminal 'act.' *On the other hand, the aider and abettor may have only the vaguest idea of the precise 'act' by which the perpetrator will commit the crime.*" (*Id*. at p. 327, italics added.)

Thus, we determine whether the evidence suffices to show: (1) defendant aided and abetted a *course of conduct* which constituted felony child abuse, and (2) a reasonable person under all the circumstances would have known that the commission of child abuse homicide was a natural and probable consequence of the commission of the felony child abuse. Under the circumstances shown by the evidence, the jury was clearly entitled to find that defendant knew that both he and Gabriela engaged in a lengthy course of conduct constituting the infliction of unjustifiable physical pain and mental suffering upon Brandon, and, given the severe nature of the physical abuse, a reasonable person would have known that a natural and probable consequence of this conduct was the death of the child.[7] By reason of their joint conduct, the jury was entitled to find that defendant and Gabriela each knew the other harbored the unlawful purpose or intent to "discipline" Brandon by administering blows to his head and body. And the jury was entitled to find that by reason of their joint conduct, defendant and Gabriela each intended to encourage and facilitate each other in the ongoing "discipline" of Brandon in this manner.

Presentence Custody Credits

The Attorney General contends the trial court awarded defendant presentence custody credits twice, even though custody credit for multiple offenses arising from the same case may only be given once. She is correct. Under section 2900.5, subdivision (b), "[c]redit shall be given only once for a single period of

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[7] As the prosecutor aptly argued to the jury: This is "a case where these people would treat that kid, that child, like their personal punching bag, where they [would] fail to feed him, make him sleep on the floor, smack him around, hit him with a belt . . . . What were their limits?" The prosecutor continued: "Question is, . . . is anyone surprised? Is anyone surprised that, in a home where these things are going on, where these bruises are being put on Brandon on a daily basis, where he's being whipped with a belt, smacked in the head, beat in the chest, are you surprised that a four-year-old succumbs to those injuries and dies?"

custody attributable to multiple offenses for which a consecutive sentence is imposed." Defendant was given 1,118 custody credits on his indeterminate abstract of judgment for child abuse homicide *and* additionally on his determinate abstract of judgment for child abuse and corporal injury (which were stayed pursuant to § 654). This error must be rectified by amending the determinate abstract of judgment to delete presentence custody credits.

DISPOSITION

The trial court is directed to prepare an amended determinate abstract of judgment (reflecting no presentence custody credits) and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.